

PUBLIC CONTRACTS REVIEW BOARD

Case No. 365

CT/4018/2011; GN/DPS/4002/PC3/2011

Period Contract for the Supply and Delivery of Granular Urea to Delimara Power Station

This call for tenders was published in the Government Gazette on 10th May 2011. The closing date for offers was 12th July 2011.

The estimated value of this tender was €3,500,000.

One (1) tenderer submitted their offers.

United Equipment (UNEC) Ltd filed an objection letter dated 8th October 2011 against the decision of the Contracts Department to disqualify its offer as technically non-compliant and to recommend tender cancellation.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman and Mr Carmel Esposito and Mr Joseph Croker as members convened a meeting on Wednesday, 11th January 2012 to discuss this objection.

United Equipment (UNEC) Ltd

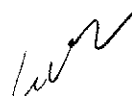
Prof. Ian Refalo	Legal Representative
Dr John Gauci	Legal Representative
Prof. Alfred Vella	Expert in Chemistry
Mr Marcus Bonnici	Representative
Mr Mario Bonnici	Representative

Enemalta Corporation (Enemalta)

Dr Antoine Cremona	Legal Representative
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Evaluation Board

Ing. Ivan Bonello	Chairman
Ing. Silvan Mugliett	Member
Ing. Albert Farrugia	Member
Ing. Joseph Mifsud	Member



After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of his company's objection.

Prof. Ian Refalo, legal representative of United Equipment (UNEC) Ltd, the appellant company, remarked that it would appear that there was a mix-up in the presentation of the standards requested in the tender document and he invited Prof Alfred Vella, an expert in chemistry, to explain the technical aspects of the issues involved.

Prof. Alfred Vella, representing the appellant, under oath, gave the following evidence:-

- i. by letter dated 30th September 2011 the Department of Contracts informed United Equipment UNEC Ltd that its bid did not satisfy the tender conditions in the following respects due to the fact that ...

"Several parameters of the submitted Urea analysis exceed the limits requested in the tender specifications; specifically the following parameters: Iron, Calcium, Magnesium, Phosphates, Potassium, Heavy Metals, where the presence (in mg/kg) of these elements/compounds in the proposed urea exceeded the limits allowed by the tender specifications".

- ii. clause 2 - Technical Requirements for Urea Granules - stated that:

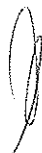
"The urea granules supplied shall comply with ISO 22241-1 or purity or (DIN 70070). The urea shall have the following specifications:

Table 1 – Urea Granules Specifications – Urea quality must comply with the ISO 2241-1 standards'

- iii. clause 1.0 of the same specifications stated, among other things, that:

'To comply with the NOx emission regulations of the islands, the engines are fitted with a Selective Catalytic Reducer (SRC) on the exhaust. The NOx reduction is obtained with the reaction of an ammonia rich reactant with the NOx emissions passing over a catalyst. In this case the ammonia rich reactant is a 40% solution of urea dissolved in demineralised water.'

- iv. chemicals, invariably, contained a degree of contamination and a chemical with a high amount of contaminants would be suitable for certain uses whereas if it had a low level of contaminants it would be suitable for other uses, say, medical purposes.
- v. whilst ISO standards referred to the 'solution', namely solidified urea dissolved in mineralised water, Table 1 referred to 'urea granules', i.e. the urea in its solid form;
- vi. the urea granules that were being proposed by United Equipment UNEC Ltd when dissolved in water would comply with ISO 22241-1 as stipulated in the tender document;



- vii. on the other hand, the urea granules specifications listed at Table 1 of the tender document referred to a more concentrated type of urea (more pure) than that required to produce the urea solution according to ISO 22241-1 referred in the same tender specifications;
 - viii. by way of explanation, this was like buying high quality table salt to spread it over snow/ice covered roads when salt of an inferior quality would have served the same purpose, in other words, it was a waste of money to procure high grade urea granules that could well be used in the pharmaceutical industry when a lower grade urea was suitable to produce the ISO standard requested for the catalyst reducer;
 - ix. if one were to stick strictly to the tender document, it also required that the presence of heavy metals had to be within certain levels but without specifying what these metals were when there were some 60 different types of heavy metals;
- and
- x. in the case of the appellant company's submission, it was true that the certain parameters of the tender with regard to iron, calcium, magnesium, phosphates, potassium, heavy metals were slightly exceeded but, still, the product would have met the ISO standard stipulated in the same tender document.

The Chairman Public Contracts Review Board remarked that if, at tendering stage, the bidder was aware that the specifications were deficient in certain respect then the company's representative/s could have raised such issues prior to the closing date of the tender so that those issues would be sorted out and communicated to prospective bidders by clarification notices.

Prof Refalo intervened to argue that, according to his client's technical personnel, the urea granules that were being proposed, when dissolved in water, would comply with ISO 22241-1 as stipulated in the tender document and, as a result, the tender submission was compliant.

Dr Antoine Cremona, legal representative of Enemalta Corporation, made the following remarks:-

- a. the appellant company's tender submission was not compliant with the specifications laid down in Table 1 of clause 2.1 – Technical Requirements for Urea Granules – which matter of fact was admitted by Prof. Vella;
- b. this supply was required for the catalyst reducer at the Delimara Power Station to treat the emissions;
- c. the contractor for the overall project, BWSC, had engaged a sub-contractor, H+H Engineering & Service GmbH to provide the selective catalytic reducers and the specifications for the urea granules were furnished by the catalyst manufacturer and Enemalta Corporation was requested to hold on to those specifications otherwise the



guarantee of the equipment could be jeopardised – in fact Table 1 was pasted on the tender document from the technical specifications provided by the sub-contractor;

- d. five contractors acquired the tender document but only United Equipment UNEC Ltd did effectively submit a bid;
- e. BWSC had been carrying out tests on the use of urea and it transpired to Enemalta Corporation that, in these tests, BWSC was using urea with the same specifications as those offered by the appellant company and the results were satisfactory;
- f. the situation had changed from tender issuing stage to tender evaluation stage such that the urea granules did not have to be as concentrated as indicated in the parameters of the tender;
- g. on the procurement procedure side, Enemalta Corporation was faced with the situation or dilemma that the product offered by the appellant company was suitable for its requirements even if it was not according to specifications but if the appellant company's offer were to be accepted, that would amount to altering the tender specifications during the tendering process;

and

- h. it could also be the case that the other four contractors who had acquired the tender document but refrained from tendering might have participated had the tender specifications not been those published but equivalent to those proposed by the appellant.

Prof. Vella explained that:-

- a. ISO 22241-1 referred to a 32.5% solution of urea whereas the technical specifications at clause 1.0 'Introduction' (page 50) stated, among other things, that in *"this case the ammonia rich reactant is a 40% solution of urea dissolved in demineralised water;*
- b. if his client's solution of 32.5% urea were to be changed to a solution of 40% urea then the level of heavy metal contaminants would still be compliant with tender requirements but the proposal would then become marginally out of specifications as indicated in the letter of rejection - for example, in the cases of iron, magnesium and phosphates the value would read 0.6 instead of 0.5 mg/kg;
- c. he would categorically refuse the argument that equipment would not function properly if, say, the phosphates content in the solution was 0.6 instead of 0.5 but, on the other hand, he did appreciate the fact that for the adjudicating board 0.6 did exceed the limit of 0.5;

and



- d. the problem arose with regard to clause 2.1 (page 50) because what was being requested in the first sentence, ISO 22241-1, did not match the specifications in the second sentence which went beyond that ISO standard since the ISO standard of 32.5% could vary from 31.8% and 33.2% but it could not reach 40%.

Dr Cremona stated that Enemalta Corporation had since exchanged correspondence with BWSC questioning the requirement of high quality urea when urea of inferior quality served the same purpose.

Prof. Refalo concluded by:-

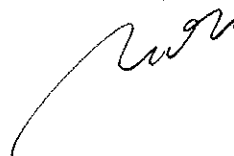
- a. discarding the argument that if his client's bid were to be accepted it would amount to changing the goalposts during the tendering process because he insisted that his client's proposal was compliant with ISO 22241-1 as stipulated in the tender document both in clause 2.1 and as repeated in Table 1 itself;
 - b. insisting that his client was positive that he had interpreted the specifications correctly and that he should not be penalised for having done that;
- and
- c. declaring that, in the case of the other tenderers who had acquired the tender document but did not submit an offer, they could have either interpreted the specifications in the same way as his client did or, if they detected a conflict between the ISO 22241-1 and Table 1 then they could have asked for a clarification

Dr Cremona concluded that:-

- a. developments had taken place after the closing date of the tender which put Enemalta Corporation in a dilemma in the sense that the appellant company's proposal would meet its requirements but that same proposal was not according to published technical specifications;
 - b. one had to appreciate that, on the basis of the information that Enemalta Corporation had at the time the tender was issued it had to adhere to the requirements of the catalyst manufacturer in order not to invalidate the guarantee;
- and
- c. it was at a later stage that the catalyst manufacturer confirmed to Enemalta Corporation that if the urea were to be of the same type as that tested by BWSC, which was similar to that proposed by the appellant company, then the guarantee would still remain valid.

At this point the hearing was brought to a close.

This Board,



- having noted that the appellant company, in terms of the reasoned letter of objection dated 17th October 2011 and through the verbal submissions made during the hearing held on the 11th January 2012, had objected against the decision of the Contracts Department to disqualify its offer as technically non-compliant and to recommend tender cancellation;
- having noted the appellant firm's representatives' claims and observations regarding the fact that (a) by letter dated 30th September 2011 the Department of Contracts informed United Equipment UNEC Ltd that its bid did not satisfy the tender conditions due to the fact that *several parameters of the submitted Urea analysis exceed the limits requested in the tender specifications; specifically the following parameters: Iron, Calcium, Magnesium, Phosphates, Potassium, Heavy Metals, where the presence (in mg/kg) of these elements/compounds in the proposed urea exceeded the limits allowed by the tender specifications*, (b) chemicals, invariably, contained a degree of contamination and a chemical with a high amount of contaminants would be suitable for certain uses whereas if it had a low level of contaminants it would be suitable for other uses, say, medical purposes, (c) whilst ISO standards referred to the 'solution', namely solidified urea dissolved in mineralised water, Table 1 referred to 'urea granules', i.e. the urea in its solid form, (d) whilst the urea granules that were being proposed by United Equipment UNEC Ltd when dissolved in water would comply with ISO 22241-1 as stipulated in the tender document, on the other hand, the urea granules specifications listed at Table 1 of the tender document referred to a more concentrated type of urea (more pure) than that required to produce the urea solution according to ISO 22241-1 referred in the same tender specifications, (e) if one were to stick strictly to the tender document, it also required that the presence of heavy metals had to be within certain levels but without specifying what these metals were when there were some 60 different types of heavy metals, (f) in the case of the appellant company's submission, it was true that the certain parameters of the tender with regard to iron, calcium, magnesium, phosphates, potassium, heavy metals were slightly exceeded but, still, the product would have met the ISO standard stipulated in the same tender document, (g) whilst ISO 22241-1 referred to a 32.5% solution of urea whereas the technical specifications at clause 1.0 'Introduction' (page 50) stated, among other things, that in "*this case the ammonia rich reactant is a 40% solution of urea dissolved in demineralised water*", if the appellant company's solution of 32.5% urea were to be changed to a solution of 40% urea then the level of heavy metal contaminants would still be compliant with tender requirements but the proposal would then become marginally out of specifications as indicated in the letter of rejection - for example, in the cases of iron, magnesium and phosphates the value would read 0.6 instead of 0.5 mg/kg, (h) whilst Prof Vella would categorically refuse the argument that equipment would not function properly if, say, the phosphates content in the solution was 0.6 instead of 0.5 but, on the other hand, he did appreciate the fact that for the adjudicating board 0.6 did exceed the limit of 0.5, on the other hand, he did appreciate the fact that for the adjudicating board 0.6 did exceed the limit of 0.5, (i) the problem arose with regard to clause 2.1 (page 50) because what was being requested in the first sentence, ISO 22241-1, did not match the specifications in the second sentence which went beyond that ISO standard since the ISO standard of 32.5% could vary from 31.8% and 33.2% but it could not reach 40% and (j) according to Prof Refalo, (i) one should discard the argument that if his client's bid were to be accepted it would amount to changing the goalposts during the tendering process

because he insisted that his client's proposal was compliant with ISO 22241-1 as stipulated in the tender document both in clause 2.1 and as repeated in Table 1 itself, (2) his client had interpreted the specifications correctly and that the company should not be penalised for having done that and (3) in the case of the other tenderers who had acquired the tender document but did not submit an offer, they could have either interpreted the specifications in the same way as his client did or, if they detected a conflict between the ISO 22241-1 and Table 1 then they could have asked for a clarification;

- having considered the contracting authority's representative's submissions, namely that (a) the appellant company's tender submission was not compliant with the specifications laid down in Table 1 of clause 2.1 – Technical Requirements for Urea Granules – which matter of fact was admitted by Prof. Vella, (b) this supply was required for the catalyst reducer at the Delimara Power Station to treat the emissions, (c) the contractor for the overall project, BWSC, had engaged a sub-contractor, H+H Engineering & Service GmbH to provide the selective catalytic reducers and the specifications for the urea granules were furnished by the catalyst manufacturer and Enemalta Corporation was requested to hold on to those specifications otherwise the guarantee of the equipment could be jeopardised – in fact Table 1 was pasted on the tender document from the technical specifications provided by the sub-contractor, (d) five contractors acquired the tender document but only United Equipment UNEC Ltd did effectively submit a bid, (e) BWSC had been carrying out tests on the use of urea and it transpired to Enemalta Corporation that, in these tests, BWSC was using urea with the same specifications as those offered by the appellant company and the results were satisfactory, (f) the situation had changed from tender issuing stage to tender evaluation stage such that the urea granules did not have to be as concentrated as indicated in the parameters of the tender, (g) on the procurement procedure side, Enemalta Corporation was faced with the situation or dilemma that the product offered by the appellant company was suitable for its requirements even if it was not according to specifications but if the appellant company's offer were to be accepted, that would amount to altering the tender specifications during the tendering process, (h) it could also be the case that the other four contractors who had acquired the tender document but refrained from tendering might have participated had the tender specifications not been those published but equivalent to those proposed by the appellant, (i) Enemalta Corporation had since exchanged correspondence with BWSC questioning the requirement of high quality urea when urea of inferior quality served the same purpose, (j) developments had taken place after the closing date of the tender which put Enemalta Corporation in a dilemma in the sense that the appellant company's proposal would meet its requirements but that same proposal was not according to published technical specifications, (k) one had to appreciate that, on the basis of the information that Enemalta Corporation had at the time the tender was issued it had to adhere to the requirements of the catalyst manufacturer in order not to invalidate the guarantee and (l) it was at a later stage that the catalyst manufacturer confirmed to Enemalta Corporation that if the urea were to be of the same type as that tested by BWSC, which was similar to that proposed by the appellant company, then the guarantee would still remain valid;

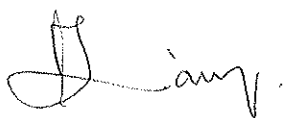
reached the following conclusions:



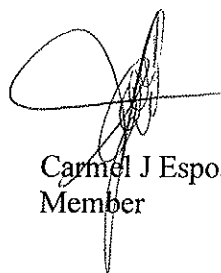
1. The Public Contracts Review Board opines that the situation had changed from tender issuing stage to tender evaluation stage such that the urea granules did not have to be as concentrated as indicated in the parameters of the tender. Furthermore, it also transpired that BWSC had been carrying out tests on the use of urea and it is a known fact that the same company was using urea with the same specifications as those offered by the appellant company and the results were satisfactory apart from being considerably cheaper.
2. The Public Contracts Review Board is also fully cognisant of the fact that five contractors had originally acquired the tender document but only United Equipment UNEC Ltd did, effectively, submit a bid.
3. The Public Contracts Review Board argues that, on the procurement procedure side, Enemalta Corporation was faced with the situation or dilemma that the product offered by the appellant company was suitable for its requirements even if it was not according to specifications. However, this Board feels that if the appellant company's offer were to be accepted, that would amount to altering the tender specifications during the tendering process, possibly being totally oblivious of the fact that any of the other four – or others for all that matters, who could have reneged on the opportunity to acquire the tender document let alone, effectively, bidding – could have participated had the specifications been lowered.

In view of the above this Board recommends that this tender be reissued bearing new standards which are equally acceptable but which result to be likewise effective as well as being cheaper. Undoubtedly, this would place all potential bidders on a level playing field and, possibly, allow more participants to submit their cheaper offers.

Considering the prevailing circumstances which transpired during the hearing, the Public Contracts Review Board recommends that the deposit paid by the appellant company should be reimbursed.



Alfred R Triganza
Chairman



Carmel J Esposito
Member



Joseph Croker
Member

30 January 2012